IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

No. 34768

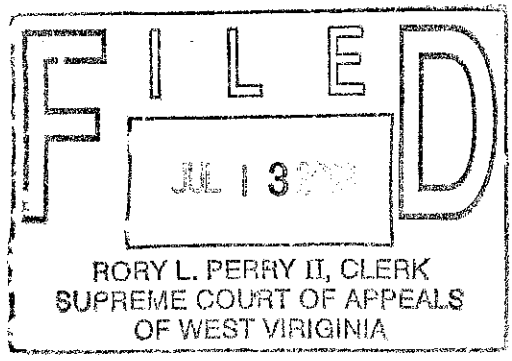
THE ASSOCIATED PRESS,

Appellant,

v.

STEVEN D. CANTERBURY,
Administrative Director of the
West Virginia Supreme Court of Appeals,

Appellee.



APPELLANT'S REPLY BRIEF

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INTRODUCTION

The e-mails at issue in this case, "relate to the conduct of the public's business" because their disclosure vindicates a state interest of the highest order – judicial integrity. In *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2266-67 (2009), the Supreme Court of the United States observed:

> "'Courts in our system, elaborate principles of law in the course of resolving disputes. The power and the perogative of a court to perform this function rests, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends, in turn, upon the issuing court's absolute probity. ***Judicial integrity is, in consequence, a state interest of the highest order.***' *Republican Party of Minn. v. White*, 536 U.S. 765, 793, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (Kennedy, J., concurring)."

(emphasis added). Appellee, by contrast, asserts the e-mail records at issue were "purely private" communications that in no way "relate to the conduct of the public's business." The only way this Court can concur with Appellee's position would be to find that judicial integrity, a state interest of the highest order, is unrelated to the public's business.

Appellee's brief seeks to distract this Court from the central issue of the case: does the West Virginia Freedom of Information Act ("WVFOIA") broad mandate of the disclosure of information held by a public body require disclosure of Justice Maynard's e-mails to the CEO of a litigant because it, "relates to the conduct of the public's business?" The information contained within the e-mail communications would shed light on the extent of Justice Maynard's relationship with Don Blankenship and whether or not that relationship would have affected or influenced Justice Maynard's decision-making in Massey cases, see the September 16, 2008 Order of the Circuit Court of Kanawha County at 13, n. 9, the e-mails are "public records" that contain information that "relates to the conduct of the public's business" and should be disclosed

pursuant to the clear mandate of the WVFOIA.

Reduced to its essence, the forty (40) page brief filed on behalf of Administrator Canterbury makes three basic arguments in support of keeping secret certain e-mail communications from a former Justice of this Court to the chief executive officer of a litigant whose case was pending before the Court. First, Appellee asserts the information contained in the withheld e-mails constitutes purely private communications containing "information of a personal nature" whose disclosure would constitute "an unwarranted invasion of personal privacy." Such information, Appellee asserts, falls within exemption 2 of the WVFOIA. Second, Appellee argues that "the overwhelming majority of courts that have considered the issues in this case have rejected the same arguments advanced by the AP and adopted by by the circuit court." Appellee's Brief at 23. Third, while conceding that the WVFOIA properly applies to "court filings and administrative matters," Appellee argues that extending the reach of FOIA to the Donald Blankenship-Justice Maynard e-mails would violate Articles V and VIII of the Constitution of West Virginia.

As explained in detail below, each of Appellee's arguments are based on a misapprehension of applicable case law and the facts of record. Appellee seeks to bolster his argument by a mischaracterizing the position taken by of the AP in this case. This Court should reject Appellee's arguments and order the release of the eight (8) e-mails at issue, but otherwise affirm the Circuit Court's judgment.

I RESPONSE TO APPELLEE'S STATEMENT OF FACTS

The Associated Press set forth in its principal brief the facts related to the narrow issue pending before the this Court. However, in light of Appellee's brief, it is necessary to emphasize the facts of record as opposed to the Appellee's statement of the facts.

The Appellee makes the unsubstantiated and absurd charge concerning the AP that there is a "legitimate question of whether its motives were journalistic or political." Appellee's Brief at 28. The Associated Press is a worldwide press organization that has reported the news objectively for decades. The decision to litigate the instant FOIA issue was made by the national office of The Associated Press.[1]

As is apparent from reading its' principal brief, the overarching interest of the AP is objective reporting of the news relating to government entities so that the public may be informed. As the AP stated in its appeal brief, in seeking the withheld public records, the public records could show that the relationship between Justice Maynard and Mr. Blankenship had no impact whatsoever on the Justice's duties and responsibilities as a public official. Indeed, from the beginning of the controversy involving Justice Maynard's relationship with Mr. Blankenship in January, 2008, The Associated Press urged the release of communications between the two

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[1] Appellee's erroneous characterization of the AP's "motive" is nothing but a red herring argument; the motive of a requestor of public records is irrelevant under FOIA:

> "a main rule [is] that the identity and particular purpose of the requester is irrelevant under FOIA. This main rule serves as a check against selection among requesters, by agencies and reviewing courts, according to idiosyncratic estimations of the request's or requester's worthiness."

U.S. Dept. of Defense v. Federal Labor Relations Authority, 510 U.S. 487, 508, 114 S.Ct. 1006, 1019 (U.S.1994) (Ginsburg, J., concurring) (citation omitted).

individuals, *inter alia*, because it could remove the cloud of controversy created by the public's reaction to the Monaco photographs.

The issue in this appeal is a narrow one. The Circuit Court accurately described the narrow scope of the AP's FOIA request as follows: "[t]he AP is not seeking internal communications between judicial officers and law clerks or other court personnel concerning judicial decision-making." Rather, the lower court stated, "the AP has requested documents concerning communications between a judicial officer and a third party, which do not implicate the judiciary's constitutional exercise of judicial power." September 16, 2008 Order at 7-8. Nevertheless, in an attempt to direct this Court's focus away from this narrow issue, Appellee asserts what is at stake here is, "more than the subject e-mails." Appellee's Brief at 34. "It is the independence of the judicial branch, for not only Supreme Court Justices, but also Circuit Judges, Family Court Judges, Juvenile Court Judges, Magistrates, and Mental Hygiene Commissioners." *Id.*

This "parade of horribles" proffered by Appellee obfuscates the narrow issue herein by dramatically mis-characterizing the relief sought by the AP:

> "the AP . . . would like nothing more than for this Court to hold that very e-mail by every public officer or employee created during business hours or on governmental equipment is a "public record," including e-mails to friends family members, and others concerning private and personal matters irrespective of whether content of those e-mails relates to the conduct of the public's business."

Appellee Brief at 10. The foregoing assertion is baseless. It is beyond cavil that the scope of records at issue here is narrow, and the AP consistently has asserted in this litigation that the content of the withheld e-mails "relates to the conduct of the public's business" as that term is used in the West Virginia Freedom of Information Act. *W.Va. Code* § 29B-1-2(4). Appellee's

assertion that the AP has sought records unrelated to the public's business is belied further by the Circuit Court's unequivocal finding that, ***"the information contained within the e-mail communications*** would have shed light on the extent of Justice Maynard's relationship with Don Blankenship and whether or not that relationship would have affected or influenced Justice Maynard's decision-making in Massey cases[.]" September 16, 2008 Order at 13, n. 9 (emphasis supplied).[2] Thus, the Circuit Court, who reviewed the undisclosed emails *in camera*, already has concluded that the information contained within the undisclosed emails are (or "would have been") related to the public's business because they do, in fact, shed light on the extent of Justice Maynard's relationship with Don Blankenship and whether or not that relationship would have affected or influenced Justice Maynard's decision-making in Massey cases. *Id.* (**"[H]ad Justice Maynard not recused himself from the *Caperton* case and other cases involving Massey, these emails would have been placed into the public's business[.]"**). Where Appellant disagrees with the lower court is in its holding that Justice Maynard's act of recusal was the determining factor of whether these communications related to the public's business. Appellee's wildly inaccurate characterization of the relief sought by the AP should not be permitted to avoid the central question presented in this appeal, that is, the extent of Justice Maynard's relationship with Don Blankenship, and whether or not that relationship would have affected or influenced Justice Maynard's decision-making in Massey cases, is related to the public's business, regardless of Justice Maynard's recusal.[3]

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[2] Appellee characterizes the AP's argument in this case as favoring a holding that, "private communications between judges and third parties who are not judicial employees are 'public records' under FOIA." Appellee's Brief at 6. The AP makes no such argument.

[3] Interestingly, Appellee does not defend the Circuit Court's reasoning concerning whether those undisclosed emails are related to the public's business.

The AP consistently has argued that the, "information contained within the e-mail communications" – that is *the content* of the e-mails – are "related to the public's business" because, as the Circuit Court found, they relate to whether or not Justice Maynard's relationship with the CEO of a litigant before the court "would have affected or influenced [his] decision-making in Massey cases," *i.e.,* the public's business. September 16, 2008 Order at 13, n.9.

Appellee also erroneously states as fact that, "the overwhelming majority of courts have considered the issues in this case and have rejected the same arguments advanced by the AP and adopted by the circuit court. Appellee brief at 15, n. 50, and at 23. As explained in detail *infra*, all of the cases cited by Appellee in support of this "overwhelming authority" assertion are, at best, inapposite to the narrow legal issue and facts of the case at bar.

Appellee further asserts that he, "disclosed documents in this case in the thousands" in response to the AP's WVFOIA request. Appellee Brief at page 30, n.81. Actually, the Appellee admitted he released only, "several hundred" documents in response to the AP request, most of which were telephone records. Transcript of Preliminary Injunction Hearing, at 8.

II ARGUMENT

A THE WVFOIA IS NOT UNCONSTITUTIONAL

1 THE WVFOIA AS APPLIED TO THE E-MAILS AT ISSUE DOES NOT INFRINGE UNCONSTITUTIONALLY ON THE POWERS OF THE WEST VIRGINIA JUDICIARY

Appellee has throughout this litigation baldly asserted the WVFOIA is unconstitutional because it infringes on the independence of the judiciary.[4] The lower court correctly rejected

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[4] Appellee dramatically asserts, "[i]n the instant case there is much more a stake than the subject emails, **the independence of the judicial branch**, for not only Supreme Court Justices, but also Circuit Judges, Family Court Judges, Juvenile Court Judges, Magistrates and Mental Hygiene Commissioners, is at stake." Appellee Brief at 34 (emphasis added).

Appellee's argument as baseless because Appellee wholly failed then, as he does before this Court, to articulate how disclosure of the emails between Justice Maynard and Mr. Blankenship conceivably could encroach upon the ability of the Supreme Court of Appeals to regulate the judiciary:

> "Based on [the] constitutional separation of power and delegation of authority [of provisions in Article V §1 and Article VIII §§ 1 and 3 of the West Virginia Constitution], the Defendant asserts that application of FOIA to the e-mail communications of a judicial officer would be unconstitutional "in so far as it encroaches on the ability of the Court to regulate the judiciary." The defendant has failed, however, to articulate how disclosure of the e-mail communications at issue would affect the judiciary's ability to properly function as an independent branch that administers the law."

September 16, 2008 Order at 7.

The lower court recognized:

> "The AP is not seeking internal communications between judicial officers and law clerks or other court personnel concerning judicial decision-making. Rather the AP has requested documents concerning communications between a judicial officer and a third party, which do not implicate the judiciary's constitutional exercise of judicial power."

Id. Finally, the Circuit Court found as a fact that the Appellee:

> "failed to articulate how application of FOIA interferes with the Supreme Court's ability to promulgate rules, regulate the judiciary, or exercise supervisory control over the judicial branch."[5]

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[5] The Circuit Court observed that this Court, itself, has mandated that West Virginia trial courts comply with the WVFOIA by virtue of Trial Court Rule 10.06:

> "(a) All persons are . . . entitled to full and complete information regarding the operation and affairs of the judicial system. Any elected or appointed official or other court employee charged with administering the judicial system shall promptly respond to any request filed pursuant to the West Virginia Freedom of Information Act.
>
> (b) Writings and documents relating to the conduct of the public's business, and

Curiously, Appellee makes no effort whatsoever to respond to or even address the foregoing findings of the Circuit Court. It is significant to note that Appellee argued in a separate section of his brief that the e-mail communications between Justice Maynard and Mr. Blankenship involved purely "private, personal, and non-judicial matters." Appellee Brief 1, 7, 8, 9, 12, 29.[6] Thus, the Appellee explicitly concedes that none of the thirteen (13) e-mail communications between Chief Justice Maynard and the CEO of a party litigant in any way implicate separation of powers issues that might interfere with the functioning of the judiciary.[7]

Appellee's abject failure to articulate any basis for holding the FOIA unconstitutional stands in especially stark contrast to the heavy burden that Appellee must meet to successfully challenge the statute's constitutionality:

> "Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. . . . In considering the constitutionality of an act of the legislature, **the**

> which are prepared, owned or retained by a court, circuit clerk, or other court employee, are considered to be public records."

[6] For example, at page 12 of his brief, Appellee describes the e-mails at issue as, "the private, personal, non-judicial, and non-administrative-emails involved in this case."

[7] On the other hand, one of the disclosed emails specifically discusses a Massey case then pending. In his email to Massey CEO Blankenship on October 11, 2007, Justice Maynard states:

> "THIS ONE YOU GOTTA SEE – ARACOMA IS MENTIONED – YOU COULD HAVE PREVENTED IT IF ONLY YOU HAD ONLY OPERATED THE MINE PROPERLY ACCORDING TO MENIS"

Ex. 1 (October 11, 2007 email from Justice Maynard to Don Blankenship). This email reflecting Justice Maynard's scepticism of claims of Massey liability is revealing in how it relates to the public's business for a number of reasons, not the least of all is that it occurred in the middle of **the night following the oral argument on the *Caperton* case** before this Court. Additionally, it reflects Justice Maynard discussing other Massey litigation with Mr. Blankenship, litigation then pending at the circuit court level that could have come before the Supreme Court at any time.

negation of legislative power must appear beyond reasonable doubt."

Syllabus Point 1, in part, *State ex rel. Appalachian Power Company v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965) (emphasis added). Appellee's bald argument[8] in support of a finding of constitutionality of the WVFOIA as it applies to the emails at issue is, as the Circuit Court concluded, wholly lacking in substance; and thus his argument simply does not come remotely close to meeting his burden of proving unconstitutionality "beyond reasonable doubt." Therefore, the Court should reject Appellee's claim of WVFOIA unconstitutionality.

2 THE WVFOIA APPLIES TO THE JUDICIAL DEPARTMENT

In his briefs below and on appeal and in his testimony at the injunction hearing, Appellee has repeatedly asserted that the term "judicial department" as used in the WVFOIA applies only to "administrative functions" of a court. Appellee's argument that the WVFOIA does not apply to the judiciary flies in the face of the clear and unambiguous language of the statute. WVFOIA specifically identifies "the judicial department" and "state officers" as subject to its disclosure requirements. Considering this clarity, it is not an understatement to characterize Appellee's argument to the contrary before the Circuit Court as incomprehensible. The Appellee's purported rationale for concluding the term "judicial department" was limiting was that, according to his testimony, the use of the term "judicial department" in the WVFOIA was "strange" and its meaning was cryptic because it was never used in West Virginia law except in

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[8] Nowhere in any briefs filed below or on appeal does Appellee bother to address or explain how the thirteen (13) e-mails – that he argues are private, personal and involve non-judicial matters having nothing to do with the functioning of the Supreme Court or cases pending before the Supreme Court – possibly could jeopardize the independence of the judiciary. Appellee's claim that the WVFOIA is an unconstitutional infringement on the independence of the judiciary as applied to the thirteen (13) e-mail communications at issue is frivolous.

the WVFOIA.[9]

Whatever rationale may underlie Appellee's testimony, the meaning of the term "judicial department" as used in the WVFOIA could not be more clear or unambiguous. Contrary to his testimony, the term is used in the fundamental charter of West Virginia government — the *Constitution* of West Virginia. Article V, § 1 of our *Constitution* creates the West Virginia judiciary using the very term the Appellee whose meaning was confusing to Appellee and his counsel. The *Constitution* of West Virginia uses the term "judicial department" to describe the entire judicial branch of government: "The legislative, executive and judicial departments shall be separate and distinct[.]" *Const.* Art. V, § 1. The term "judicial department" used in the *Constitution*, as well as in the WVFOIA, clearly and unequivocally means the entire judicial branch of the State of West Virginia's government and nothing less. The WVFOIA use of that

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[9] In his testimony at the injunction hearing concerning the term "judicial department," Appellee explained his position:

> "I do know that we [Appellee Canterbury and Court Counsel Kirk Brandfass] talked at some length about *the strange language and of the law*. But *as far as we could tell was the only time in the code that the judiciary was ever referred to as a judicial department*. That was a *very strange use of language* and so it made it -- we never for a moment hesitated to understand that any administrative staff member's e-mail surfaced under FOIA. We thought that the department might have been attempting on somebody's part when they were crafting paragraph 2 and made some sort of distinguish between -- distinction between the staff and the judges. . . . Well, *we couldn't figure out exactly what judicial department meant*, but if judicial department means the administrative staff, for example, the e-mails from me or e-mails from the judge's secretary or a magistrate clerk, yes, they're subject to FOIA. However, *we weren't sure -- I'm not sure to this day what they meant by department exactly.* If judges are -- *it's just a strange use of language. I don't know that anybody has seen that very often, use of a judicial department.* Usually it's a judiciary or a judicial branch but not department."

Hearing Transcript at 31-32 (emphasis added).

term is not "strange" or ambiguous in any way. Clearly it applies to the entirety of the judiciary, which of course includes judges.[10]

Thus, for good and appropriate reasons, the Circuit Court flatly rejected Appellee Canterbury's assertion that the WVFOIA does not apply to West Virginia's judges on the basis of the use of the phrase "judicial department":

> "[G]iven that the application of FOIA to the public records of judicial officers would not invade the constitutional power of the judiciary, the Court finds that FOIA, by its express terms, applies to judicial officers, as they are "state officers" and members of the "judicial department."

September 16, 2008 Order at 9, 15.

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[10] Were that not enough, the WVFOIA itself gives guidance on its interpretation that is ignored by Appellee, instructing that the Act be liberally construed to carry out the expressed public policy of providing to the public full and complete information regarding the affairs of government. *W.Va. Code* § 29B-1-1. Thus, even if one could make a colorable argument that the term "judicial department" is somehow "undefined" or ambiguous, the mandated liberal construction of the Act makes clear the term "judicial department" may not be construed as being limiting language, but rather in language that could not be more broad:

> ""Public body' means **every** state officer, agency, department, including the executive, legislative and judicial departments, division, bureau, board and commission . . . and **every other body which is created by state or local authority or which is primarily funded by the state or local authority.**"

W.Va. Code § 29B-1-2(3) (emphasis added). Considering the clear and obvious breadth of the statute, Appellee's argument that the term "judicial department" is somehow *limiting* (Appellee's Brief at 37) is untenable.

3 THIS COURT SHOULD REJECT APPELLEE'S NEW ARGUMENT THAT WVFOIA IS "UNCONSTITUTIONAL AND UNENFORCEABLE" IF PUBLIC RECORDS SOUGHT HAVE ANYTHING TO DO WITH ALLEGATIONS OF CONDUCT IN VIOLATION OF THE CODE OF JUDICIAL ETHICS

In Part B of the argument in his brief, Appellee resurrects and substantially modifies the argument he made below that the WVFOIA is unconstitutional or otherwise of limited application based upon the specific application of the Act to the, executive, legislative and judicial departments." *W.Va. Code* 29B-1-2(3). For the first time on appeal, the Appellee argues the WVFOIA is "unconstitutional and unenforceable" if the public records sought in a WVFOIA request has anything to do with, "allegations of conduct in violation of the Code of Judicial Ethics." *Id.* at 29-30. Appellee makes this argument even though he finally concedes WVFOIA applies to both "judicial and administrative functions." Appellee Brief at 29. This argument was not raised below and Appellee waived the right to raise it in this appeal. Notwithstanding this waiver, the Appellant will respond below.

In support of Appellee's entirely new argument that the WVFOIA is unconstitutional, as applied to the judiciary, Appellee offers a convoluted hodgepodge of straw-man legal arguments that are irrelevant to the issue he seeks to raise on appeal. Response Brief at 30-31.[11]

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[11] The numerous straw-men arguments Appellee utilizes to obfuscate the specific issue of FOIA's applicability to emails between Justice Mayanrd and Mr. Blankenship include: (1) that the State Constitution bars FOIA from applying to communications between judges or court personnel concerning judicial matters," records the disclosure of which Appellant has not requested (Response brief at 31); (2) "grand juror" records, which were never requested and not at issue; (3) "domestic relations" records, also not requested and not in issue; (4) "juvenile" records, not requested and not in issue; and (5) "sealed court records," not requested and that also are not in issue. See Appellee Brief at 31, 35.

Nevertheless, it is worth noting that Appellee's argument is undercut further because each of the types of records identified appear to be addressed by WVFOIA's specific

The issue here is narrow. It concerns public records of e-mails between a statewide elected government official (who is a Judge) and a corporate executive who is the CEO of a litigant appearing before the Judge's Court. Appellee, however, offers up the novel hypothesis that WVFOIA is unconstitutional in this context because it, "is clearly contrary to the sound administration of justice." Appellee Brief at 31. He then attempts to equate the communications at issue with (1) grand jury records, (2) domestic relations records, and (3) juvenile records; and (4) sealed court records. Appellee Brief at 31, 35. *See supra,* n. 9.

Try as Appellee may to change the issue, the public records in dispute herein are limited to communications between Justice Maynard and Mr. Blankenship. The Circuit Court correctly held disclosure of the e-mails, "would not invade the constitutional power of the judiciary." September 16, 2008 Order at 16 . Appellee's contrived comparisons are baseless, and Appellee's attempt to change the focus of the appeal to matters that are raised neither by the AP's FOIA request, the lower court's decision nor that have any basis in law, should be rejected

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exemptions, and therefore not subject to disclosure. For example, both internal communications concerning judicial matters and grand jury secrecy likely fall within the deliberative process exception to the WVFOIA found in exemption eight (8). *W.Va. Code* § 29B-1-4(a)(8); *see also State ex rel. Matko v. Ziegler*, 154 W.Va. 872, 879-880, 179 S.E.2d 735, 740 (W.Va. 1971) ("Though the statute expresses no requirement of secrecy, it has long been the policy of the law in the furtherance of justice that *the investigations and deliberations of a grand jury should be conducted in secret*, and that all its proceedings should be legally sealed against divulgence."), *overruled on other grounds, Smoot v. Dingess* 160 W.Va. 558, 563, 236 S.E.2d 468, 472 (1977). Both juvenile records and domestic relations records are specifically exempt from disclosure by statute and thus fall under exemption five (5). *W.Va. Code* § 29B-1-4(a)(5); *W.Va. Code* §§ 49-7-1 and 49-5-17 (confidentiality of juvenile records); *W.Va. Code* § 48-1-303 (confidentiality of domestic relations records). Sealed court records may be exempt if they fall under the purview of one of the enumerated exemptions, but courts cannot seal otherwise public records. Interestingly, this specific argument concerning sealed records was raised by counsel for Appellee in the recent case of *In re Charleston Gazette FOIA Request,* 222 W.Va. 771, 671 S.E.2d 776 (W.Va. 2008), and was rejected by this Court when it ordered disclosure of the sealed public records. Thus, the "sealed records" argument, although not in issue here, already has been rejected by this Court. *Id.*

summarily.

4 THE CASES RELIED ON BY APPELLEE ARE INAPPOSITE AND IRRELEVANT TO THE CONSTITUTIONALITY OF THE WVFOIA

In his attempt to avoid his dual burdens of showing an *express* exemption from WVFOIA,[12] and proving unconstitutionality beyond a reasonable doubt,[13] Appellee looks to case law of other states where, contrary to West Virginia law, judges *specifically* are exempted from disclosure requirements of more restrictive state open records laws. Appellee contends these inapposite statutes are relevant to the interpretation of the WVFOIA. Curiously, Appellee ignores the fact that the WVFOIA explicitly includes "the judicial department" and "public officers" as subject to public record requests, while the open records laws in other jurisdictions specifically exclude them from their purview. Additionally, unlike other states, West Virginia law is clear that any exemption from the disclosure requirements of the WVFOIA must be expressly stated at law. Unlike the cases Appellee cites, the WVFOIA contains no exemption for Justices or judges. Thus, Appellee's stated rationale for withholding public records directly contradicts the clear mandate of WVFOIA.

Appellee wholly ignores the clarity in which this Court has addressed the differences

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[12] In reviewing Appellee's argument, this Court requires, "[t]he party claiming exemption from the general disclosure requirement under *W.Va. Code* § 29B-1-4 has the burden of showing the ***express*** applicability of such exemption to the material requested." *Syl.* Pt. 7 of *Queen v. West Virginia University Hospitals,* 365 S.E.2d 375 (W.Va. 1988)(emphasis added). Appellee has not attempted to meet his burden of showing some express articulation in the law that the judiciary is exempt from WVFOIA's disclosure requirements. There is no evidence of record that any of the thirteen (13) e-mails at issue in any way impinge on the independence of the judiciary, and so Appellee is stuck with the unenviable position of arguing that the open records laws of other states, laws that are profoundly and distinctly dissimilar on the specific points at issue in this appeal, somehow support his position.

[13] *Syllabus* Point 1, *State ex rel. Appalachian Power Company v. Gainer, supra.*

between West Virginia open records law and those of most other states. Indeed, this Court specifically has recognized that WVFOIA is unique and dissimilar from other states' open record laws and that holdings from other states interpreting those statutes are unpersuasive:

> "As indicated in *Queen v. West Virginia University Hospitals, Inc.*, 179 W.Va. 95, 102, 365 S.E.2d 375, 382 (1987), the FOIA statutes of the various states differ materially in their definitions of a "public body" . . . . [A]s in *Queen,* **we do not consider the authorities interpreting the dissimilar statutes to be persuasive."**

4-H Road Com. Ass'n v. W.V.U. Foundation, 388 S.E.2d 308 (W.Va. 1989) (emphasis added). Nevertheless, without so much as acknowledging the foregoing, Appellee offers up a number of inapposite cases interpreting dissimilar statutes in support of his thesis that the West Virginia FOIA does not apply to the judiciary. These cases easily are distinguishable from West Virginia law on the basis, *inter alia*, that the other states' FOIA statutes contain specific exclusions for the records sought.

For example, Appellee relies upon *In re Biechele*, 2006 WL 1461192 (R.I. Super.), an unpublished Rhode Island trial court decision that has no precedential value under Rhode Island law.[14] An examination of the unpublished order in that case shows that Rhode Island law, unlike West Virginia law, specifically limits the application of that state's public records law to the judiciary "only in respect to their administrative functions." *R.I. Gen. Laws* § 38-2-2(1). Because, the WVFOIA contains no such limitation, not only is the case cited improperly as authority,[15] the fact that it turns on limiting statutory language not found in the WVFOIA shows

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[14] It should be noted that unpublished orders in Rhode Island cases may not be cited by counsel and unpublished orders are without precedential effect. *Rhode Island Sup. Ct. Rules*, Art. 1, Rule 16(e) and (j).

[15] *See State v. Myers,* 216 W.Va. 120, 127, n. 10, 602 S.E.2d 796, 803, n. 10 (W.Va. 2004) ("This court normally does not cite unpublished decisions."); *State ex rel. Allstate Ins. Co. v.*

clearly its inapplicability to the case at bar.

Appellee also relies upon an unpublished Texas case concerning a request made for the telephone records of Texas judges under that state's Open Records Act. *Order and Opinion Denying Request Under Open Records Act,* 1997 WL 583726 (Tex. 1997). Like Rhode Island law, unpublished orders in Texas have no precedential value. *Texas Rules of Appellate Procedure* Rule 47.7. *See supra,* n. 13. What Appellee conveniently omits from his discussion of the case is that Texas law *specifically excludes the judiciary from its open records law.* As stated in the very case cited by Appellee "the [Texas Open Records] Act plainly states, 'Governmental body'.. does not include the judiciary." In sum, both the Rhode Island and Texas unpublished cases have no precedential value *and* involve laws that specifically limit or exclude application of open records laws to judges. In stark contrast, the WVFOIA explicitly applies to West Virginia's judicial department and state officers.

Appellee also relies upon a published Colorado decision, *Office of State Court Administrator v. Background Information Services, Inc.,* 994 P.2d 420 (Col. 1999). The issue in that case was whether Colorado's open records law applied to the judiciary. Colorado's statute, unlike West Virginia's, did not expressly include the judicial department within its purview. The Colorado court held that the Colorado Open Records Act did not apply to the judiciary because it found that **the state legislature** did not intend to include the judiciary within the purview of the Open Records Act. It is clear from the decision, however, that if Colorado's Legislature enacted an Open Records Act that, like West Virginia's FOIA, explicitly applied to the judicial

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Karl, 190 W.Va. 176, 181, 437 S.E.2d 749, 754 (W.Va.1993) ("It would appear in Tennessee that an unpublished opinion "has no precedential value except to the parties in the case[.]" . . . If it did have precedential value in Tennessee, we would have to determine under principles of comity whether we could give it precedential value.")

department, that Court would have applied the law as written,[16] because the decision turned on the intent of the Legislature. Of course, in West Virginia, the intent of the Legislature is obvious on the face of the statute, and using the Colorado court's rationale of examining the intent of the Legislature leads inexorably to the conclusion that the judiciary falls within the scope of the WVFOIA. Therefore, *Office of State Court Administrator, supra*, actually supports Appellant's position, not that of the Appellee.

Appellee's reliance on these inapposite foreign court decisions interpreting dissimilar statutes reveals the meritless nature of his argument. In contrast, the WVFOIA and West Virginia cases construing that statute explicitly and unambiguously show that public records of the West Virginia judicial department are subject to disclosure. Appellee cannot rely upon interpretations of dissimilar foreign States' statutes to meet his burden of showing an "express" exemption from WVFOIA's general disclosure requirements in West Virginia law, or meeting his burden of proving unconstitutionality "beyond a reasonable doubt."

Each and every one Appellee's arguments asserting that the WVFOIA is unconstitutional as applied to the West Virginia judicial department and the State's judges lacks any merit

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16 The Colorado Court observed:

> "**When the General Assembly wishes to address and resolve that balance, its specific intent clearly governs** - as evidenced by mandates such as the requirement that the court registry of actions, the judgment record, and records of official actions in criminal cases be made public, and the proscription against release of juvenile records. When the General Assembly has not chosen to act with specificity, court rules and procedures govern, and it rests with the court either on a generalized or a specific basis to balance the competing interests."

Office of State Court Adm'r v. Background Information Services, Inc., 994 P.2d 420, 429 (Colo.1999) (emphasis added).

whatsoever. Therefore, this Court should sustain the Circuit Court's holding that the WVFOIA is constitutional and properly applies to public records "prepared, owned and retained by a public body" including "any writing containing information relating to the conduct of the public's business."

B THE CIRCUIT COURT PROPERLY HELD THAT E-MAILS BETWEEN A JUDGE AND CEO OF A PARTY LITIGANT ARE PUBLIC RECORDS THAT MUST BE RELEASED IF THE E-MAILS "RELATE TO THE CONDUCT OF THE PUBLIC'S BUSINESS"

In significant ways, Appellee's brief mischaracterizes the facts of record, the case law and the arguments of the Associated Press. The issue before the Circuit Court and now this Court is whether information in the subject e-mails is "related to the conduct of the public's business" and thus are "public records" under *W.Va. Code* § 29B-1-2(4). It is self-evident, and the Circuit Court correctly held, that e-mails that relate to the conduct of the public's business are public records under WVFOIA and are subject to disclosure if they do not fall within a specific WVFOIA exemption. September 16, 2008 Order at 16.

Nowhere in Appellee's brief does he acknowledge the overarching mandate of the WVFOIA: that the disclosure provisions of the Act must be liberally construed to effectuate its remedial purpose and to carry out the declared public policy of this State that,

> "all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees."

W.Va. Code § 29B-1-1. Appellee also fails to address the fact that the burden falls on the government, in this case Appellee, to show entitlement to any claimed exemption. *W.Va. Code* § 29B-1-4; *Syl.* Pt. 7, *Queen, supra*. As explained below, both propositions of law properly were

embraced by the Circuit Court in accord with the well-established WVFOIA precedent of this Court.

1 THE CIRCUIT COURT CORRECTLY HELD THAT INFORMATION IN E-MAILS SENT FROM A JUDGE TO THE CEO OF A PARTY LITIGANT THAT "RELATE TO THE CONDUCT OF THE PUBLIC'S BUSINESS" ARE "PUBLIC RECORDS" UNDER WVFOIA THAT MUST BE DISCLOSED

The WVFOIA defines "public record" to include "any writing containing information relating to the conduct of the public's business, prepared, owned and retained by a public body." *W.Va. Code* § 29B-1-2(4). The record shows Justice Maynard sent thirteen (13) emails to Donald Blankenship, the CEO of Massey Energy Company, at a time when Mr. Blankenship's companies had litigation pending before both the Supreme Court and West Virginia trial courts, and Justice Maynard already had refused to recuse himself from a Massey case on the basis that he and Mr. Blankenship were only "social acquaintances."[17]

The Circuit Court found "the parties do not dispute that the e-mail communications 'were prepared owned and retained by the Defendant,'" thus satisfying the first half of *W.Va. Code* § 29B-1-2(4)'s definition of "public record." September 16, 2008 Order at 10. The Circuit Court properly held also that the second half of the definition is satisfied when the content and/or

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[17] Justice Maynard identified his relationship with Mr. Blankenship as follows in response to a recusal motion filed in a 2004 case wherein Massey affiliates were defendants:

> "The fact that I know Mr. Blankenship socially is insufficient to disqualify me . . . or to cause my partiality to reasonably be questioned. [I]t is an inescapable fact of life that justices will have associations and friendships with parties coming before this Court."

Recusal Statement *In Re Flood Litigation* (W.Va. Sup.Ct. Docket No. 31688) (November 3, 2004) (emphasis added).

context of an e-mail "relate to the conduct of the public's business." *Id.*

Appellee, however, takes the position that the *context* of the e-mails involved in this case is irrelevant to whether the information "relates to the conduct of the public's business." Appellee Brief at 18. The Circuit Court properly rejected this argument, observing that it should consider both context and content and was required by the Legislature to liberally construe the WVFOIA's definition of public record. September 16, 2008 Order at 10, 12. The Circuit Court held, "**the information *contained within*** the [eight] e-mail communications would have shed light on the extent of Justice Maynard's relationship with Don Blankenship and whether or not that relationship would have affected or influenced Justice Maynard's decision-making in Massey cases[.]" *Id.* at 13, n. 9 (emphasis added).[18]

Appellee argues that although the information in the e-mails would shed light on whether or not Justice Maynard's relationship with Donald Blankenship affected the Justice's decisonmaking in Massey cases, the information does not "relate to the conduct of the public's business." Apparently, it is also the Appellee's position that e-mails between any public official and a private party containing information revealing corrupt, illegal or unethical conduct outside the official's public duties also would not "relate to the conduct of the public's business" and may be concealed from the public. Appellee takes that position, notwithstanding the WVFOIA's admonition that, "all persons are, unless otherwise expressly provided by law, entitled to *full and complete information regarding the affairs of government and the official acts of those who*

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[18] The *Vaughan* Index produced by Appellee reveals that the subject of one of the undisclosed emails concerns a meeting agenda from the Chamber of Commerce. Ex. 3. No details of this email are disclosed, but it is significant also that the Chamber of Commerce regularly appears before the Court in amicus capacity, and that Mr. Blankenship is a member of the Board of Directors of the United States Chamber of Commerce.

represent them as public officials and employees." *W.Va. Code* § 29B-1-1 (emphasis added).

Simply put, Appellee's narrow, crabbed interpretation of the term "public record" is inconsistent with the explicit mandates of the Act. *West Virginia Code* § 29B-1-3(1) provides, in relevant part, that:

> "[t]he custodian of any public records, unless otherwise expressly provided by statute, shall furnish proper and reasonable opportunities for inspection and examination of records in his or her office[.]"

W. Va. Code § 29B-1-2 (4) defines "Public record" to include:

> "*any writing containing information relating to the conduct of the public's business*, prepared, owned and retained by a public body."

(Emphasis added). Whether or not Appellee chooses to address it, it is clear the disclosure provisions of the WVFOIA, *W.Va.Code* § 29B-1-1, *et seq.*, must be "liberally construed," *W.Va.Code* § 29B-1-1, *Syl.* pt. 4 (in part), *Hechler v.Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985); *Syl.* Pt. 1, *Daily Gazette, Inc. v. Withrow*, 177 W.Va. 110, 350 S.E.2d 738 (1986), *superceded by statute on other grounds as recognized by Daily Gazette Co., Inc. v. West Virginia Development Office*, 206 W.Va. 51, 521 S.E.2d 543 (1999).

As the Circuit Court held, it is undisputed that the e-mails at issue herein were prepared, owned and retained by a public body. Additionally, the withheld e-mails clearly *relate* to the conduct of the public's business.[19] The record reflects that in regard to communications made by

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[19] *See e.g.*, *Wiggins v. McDevitt,* 473 A.2d 420, 422 (Me.1984), wherein the Supreme Court of Maine construed Maine's statute that, like West Virginia, defines a "public record" as a record that, "contains information relating to the transaction of public or governmental business":

> "In construing the term "public records" we "must look first and primarily at the language of the provision." *Moffett v. City of Portland,* 400 A.2d 340, 345 (Me.1979). It is apparent that the legislature sought to avoid uncertainty by enacting a very broad, all-encompassing definition subject only to specific exceptions. The statute was designed to avoid restrictive

a sitting justice with the CEO of a party with litigation pending before the justice's court, that the Circuit Court found, "would have shed light on the extent of Justice Maynard's relationship with Don Blankenship and whether or not that relationship may have affected or influenced Justice Maynard's decision-making in Massey cases," and therefore, "the public would have been entitled to that information." September 16, 2008 Order at 13, n.9. As stated above, the WVFOIA mandates that the term "conduct of the public's business" be construed liberally with the view of carrying out the [Act's] declaration of public policy. *W.Va. Code* §§ 29B-1-1, and 29B-1-2(4).

In *Daily Gazette Co. Inc. v. Withrow, supra,* this court emphasized that,

> "*W.Va. Code*, 29B-1-2(4) constitutes a liberal definition of a 'public record' in that it applies to any record which contains information "'relating to the conduct of the public's business,' without the additional requirement that the record is kept "as required by law" or "pursuant to law," as provided by the more restrictive freedom of information statutes in some of the other states."

Id., 177 W.Va. at 115, 350 S.E.2d at 742-43, *citing*, Braverman and Heppler, *A Practical Review of State Open Records Laws,* 49 Geo.Wash.L.Rev. 720, 733-35 (1981). Liberally construing the WVFOIA term 'conduct of the public's business,' as this Court must, the thirteen

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> common law definitions of public records. It declares as a matter of public policy that records of public action shall be open to public inspection. It leaves little room for qualification or restriction.
>
> Defendant describes the information in his tax returns as "related in only the most peripheral manner with the transaction of governmental business." Notwithstanding the attenuated relationship between the information in his tax returns and the performance of his public duty, the copies of the tax returns in his possession contain information *relating* to the transaction of public business. We are compelled to conclude that those portions of the copies of defendant's tax returns reporting his income from the service of civil process are public records. A liberal construction of the language of section 402(3) permits no other conclusion."

(13) e-mails at issue necessarily fall within the scope of "public records" and thus are subject to disclosure under the WVFOIA.

E-mails containing information showing, "whether or not Justice Maynard's relationship with the CEO of a litigant before the court "would have affected or influenced [his] decision-making in Massey cases." September 16, 2008 Order at 13, n. 9, "relate to the conduct of the public's business" and "all persons are . . . entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." Indeed, the Circuit Court reviewed the e-mails *in camera*, and found that the all of the e-mails related to the conduct of the public's business, or would have but for the recusal. *Id.*

The Associated Press' appeal brief explains why the e-mails involved in this case "relate to the conduct of the public's business," and thus as public records must be disclosed to the public. Appellant Brief at 9-29. Appellee's response argument that e-mails that do not specifically discuss pending cases are not "public records" subject to disclosure under the Freedom of Information Act is an unnecessarily narrow construction of the term public record at odds with the mandated liberal construction, and thus has no merit.

2 THIS CASE DOES NOT INVOLVE PURELY PRIVATE COMMUNICATIONS THAT HAVE NO RELATIONSHIP "TO THE CONDUCT OF THE PUBLIC'S BUSINESS"

Appellee makes erroneous assertions regarding the Associated Press' position. Contrary to Appellee's assertions, the AP does not claim that (1) all e-mails on government internet servers "relate to the conduct of the public's business," (2) when the Press makes a FOIA "inquiry into private e-mails of judicial officers and employees, the inquiry itself transforms the e-mails into "public records," or that (3) all purely private e-mail communications between a government official and/or employee constitutes a public record that must be disclosed, even if

the e-mail does not "relate to the conduct of the public's business." In making each of these assertions, Appellee creates "straw-man" arguments and proceeds to knock them down repeatedly throughout his lengthy brief, citing inapposite state court cases from Arizona, Arkansas, Colorado, Florida, Ohio, and Washington. Appellee Brief at 16-28.

These assertions obfuscate the Associated Press' position in the case at bar. The AP's position is clear and can be simply stated: (1) not all documents on publicly-owned equipment automatically are "public records," but those that relate to the public's business are; and (2) just because the Press makes a FOIA request for information does not transform the information into a public record, because it still must meet the definition of public record in *W.Va. Code* § 29B-1-2(4), and (3) not all private communications between government officials and employees must be disclosed, but those that meet the definition of public record must be disclosed unless specifically exempt. Under the WVFOIA, the line between disclosure and materials exempt from disclosure is drawn by *W.Va. Code* § 29B-1-2(4). The AP's position is that *what must be disclosed under the WVFOIA are records that contain information that "relates to the conduct of the public's business."*

In sum then, if information "relates to the conduct of the public's business," it is a public record that must be disclosed unless it falls within a specific WVFOIA exemption. This was also the correct holding of the Circuit Court.

3 APPELLEE ERRONEOUSLY ASSERTS THAT AN "OVERWHELMING MAJORITY" OF COURT DECISIONS SUPPORT HIS ARGUMENTS AND MISCHARACTERIZES THE CASES AND THE LAW THE DECISIONS CONSTRUE

In his briefs before the Circuit Court and now on appeal, Appellee has argued that the "overwhelming majority of courts that have considered the issues in this case have rejected the

arguments advanced by the AP and adopted by the circuit court." *See, e.g.,* Appellee Brief at 15, n. 50 and at 23). This representation is not accurate. In point of fact, there are few state court decisions pertaining to the issues in this case. What is overwhelmingly clear, however, it that the handful of cases cited by the Appellee involve FOIA statutes that, unlike West Virginia law, expressly exempt the judicial branch, or that have a far more narrow scope of application than the WVFOIA, and/or, unlike WVFOIA, do not define the term "public record."

The Circuit Court correctly found that "the cases cited by the Defendant . . . analyze and apply state open records laws with vastly different definitions of 'public records' as compared to West Virginia's." September 16, 2008 Order at 10-11. "Most of the statutes analyzed in the cases cited by Defendant employ more restrictive language in defining 'public record' and are of limited value to an analysis of West Virginia law." *Id.* at 11.

Notwithstanding the Circuit Court's review and clear finding of dissimilarities of the statutes and cases cited by the Appellee, on appeal these dissimilar cases and statutes are represented by Appellee to instead constitute an "overwhelming authority," supporting non-disclosure under West Virginia law.[20] Because Appellee has continued to advocate these dissimilar inapposite cases as support for nondisclosure, Appellant shows again below how each case cited is wholly unpersuasive authority.

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[20] Interestingly, in three (3) of the six (6) cases cited by Appellee, courts in Arizona, Arkansas, Washington actually found some of the e-mails at issue to be public records, and ordered their release. *See Griffis v. Pinal County*, 215 Ariz. 1, 3, 156 P.3d 418, 420 (2007) (trial court ordered release of -emails and supreme court remanded with instructions to trial court to review *in camera*); *Pulaski v. Arkansas Democrat-Gazette, Inc.*, 370 Ark. 435, 437-438, 446, 260 S.W.3d 718, 719-720, 726 (2007) (*per curiam*) (same); *Tibierno v. Spokane County*, 103 Wash. App. 680, 685-686, 13 P.3d 1104, 1107 (2000); *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wash App. 319, 324, 328, 890 P.2d 544 (Wash App. Div. 3 1995).

4 APPELLEE RELIES UPON CASES THAT CONSTRUE SIGNIFICANTLY NARROWER OPEN RECORDS LAWS THAN WVFOIA'S "CONDUCT RELATING TO THE CONDUCT OF THE PUBLIC'S BUSINESS"

Appellee relies on Arizona, Arkansas, Colorado, Florida, Ohio, and Washington cases in asserting the Circuit Court erred in holding that the WVFOIA's definition of "public record" is much broader than the definition of "public record" in the open records laws of those foreign states. Not surprisingly, faced with the broad language in the West Virginia Act, Appellee seeks shelter in the law of these other states, while ignoring cases construing the Idaho and California open records laws that contain essentially the same language and mirror the wide breadth of the WVFOIA.

The Circuit Court properly relied on this Court's succinct description of the breadth of the WVFOIA versus the laws of other states:

> "*W.Va.Code,* 29B-1-2(4) [1977] constitutes a *liberal definition of a "public record"* in that it applies to any record which contains information "relating to the conduct of the public's business," without the additional requirement that the record is kept "as required by law" or "pursuant to law," as provided by *the more restrictive freedom of information statutes in some of the other states.*"

Withrow, supra, 177 W.Va. at 115, 350 SE 2d at 742-743. *Withrow's* finding that other states' freedom of information laws are more restrictive than WVFOIA conveniently is ignored by Appellee. An examination of the open records laws of Arizona, Arkansas, Florida, and Ohio reveals that the Circuit Court correctly held that,

> "[a]s compared with open records laws in other states, the West Virginia FOIA contains a "liberal definition" of "public record" because it does not require records that the records be made or received in connection with a law or used in the transaction of public business."

September 16, 2008 Order at 16, citing *Withrow, supra.*

The Arizona statute is construed in *Griffis*, 215 Ariz. 1, 156 P.3d 418. The Arizona open records statute does not contain a definition of public records – in contrast to WVFOIA's extraordinarily broad definition of "relating to the conduct of the public's business." *See* Ariz. Rev. Stat. § 39-121.

The Florida Statute is construed in *State v. City of Clearwater*, 863 So.2d 149 (Fla. 2003). The Florida statute defines public records much more narrowly than the WVFOIA, including only documents, "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency[,]" a definition that mandates public records must be those that are transacting *official business*, as opposed to the broad language of the WVFOIA of records, "relating to the conduct of the public's business." *See* Fla. Stat. § 119.011(1).

In *State ex rel. Wilson-Simmons v. Lake County Sheriff's Dep't.*, 693 N.E.2d 789 (Ohio 1998) (*per curiam*), the narrow scope of the Ohio law contrasts sharply with the extremely broad scope of the definition of public record contained in the WVFOIA. In *Wilson-Simmons*, a sheriff's department employee made a FOIA request seeking a co-worker's racially derogatory e-mail comments about her. The Ohio statute requires the disclosure of "records." The Ohio definition of "records" is narrowly limited to those that "*document the organization, functions, policies, decisions, procedures, operations, or other activities* ***of the office***." *Id.* at 792 (*quoting* Ohio Rev. Code Ann. 149.011(G)) (emphasis added).

Ohio's "record" definition is not comparable to the definition of "public records" in West Virginia. Relying on the Ohio statute's narrow definition of "records," the Ohio court found the requested e-mails were not "records" under the Ohio Act. *Id.*, at 793. The narrow definition of the term "records" under the Ohio statute is limited to those papers documenting the official

activities of the office. *Id.* Indeed, Appellee advocates for this to be the law in West Virginia. However, this differs significantly from the broad definition of "public record" found in the WVFOIA. Appellee admits this stark contrast in the instant case, where a "public record" under West Virginia law requires only that the record contain "information relating to the conduct of the public's business[.]" Appellee Br. at 20, *quoting W.Va. Code* § 29B-1-2(4).[21]

In *Denver Publishing Co. v. Bd. of County Commissioners*, 121 P.2d 190 (Colo. 2005), the Colorado Supreme Court was called upon to interpret that states' open records law that specifically excludes correspondence of a public official that is, "without a demonstrable connection to the exercise of functions required or authorized by law or administrative rule and does not involve the receipt or expenditure of public funds – an explicit an exclusion absent from the WVFOIA. *See* Colo. Rev. Stat. Ann. § 24-72- 202(6)(a)(II).

In contrast, the Idaho and California cases, *Cowles Publishing Co. v. Kootenai County Bd. of County Commissioners*, 144 Idaho 259, 159 P.3d 896 (2007) and *Commission on Peace Officer Standards and Training v. Superior Court*, 42 Cal.4th 278 (2007), referenced by the Appellee involve extraordinarily broad definitions of "public record" like that used in the WVFOIA. In those cases, the records were held to be public and courts ordered them disclosed

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[21] Appellee plays transparent word games with a sentence in the Ohio court's opinion. He highlights the following clause in this sentence, "[t]herefore, although the alleged racist e-mail was created by public employees via a public office's e-mail system, it was never used to conduct the business of the public office and did not constitute records for purposes of R.C. 149.011(G) and 148.43." Appellee Br. at 20, *quoting Wilson-Simmons*, 693 N.W.2d at 792-93 (emphasis in Appellee's Brief). Extrapolating, he continues, "in the instant case, a 'public record' under the [West Virginia] Freedom of Information Act requires 'information relating to the conduct of the public's business, prepared, owned and retained by a public body." Appellee Br. at 20 (emphasis in original). The attempt by Appellee to equate the two underlined phrases is mere sophistry. The phrase, "used to conduct business of the public office," obviously is more narrow than information "relating to the public's business."

to FOIA requesters. While Appellee seeks to direct the Court's attention toward inapposite decisions from four other states with open records laws dissimilar to the WVFOIA, the California and Idaho cases interpret a statute using almost *exactly* the same language defining "public record" as does the WVFOIA.

The Idaho statute defines "public records" as including "any writing containing information relating to the conduct or administration of the public's business." The Idaho Supreme Court held that the presence of an e-mail on a public computer system does not, standing alone, render the e-mail a public record, but that, if the e-mail involves a matter of "legitimate public interest," it is a public record. That holding has been cited by the AP, and was found persuasive by the Circuit Court in the case at bar. In his brief, Appellee concedes the breadth of the Idaho law, and in so doing admits the similar extraordinarily broad definition of "public record" of the WVFOIA:

> "[i]n Idaho, the term "public record" is defined as "any writing containing information relating to the conduct or administration of the public's business prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency regardless of physical form or characteristics." [footnote omitted] Accordingly, it has been observed, "The Idaho public records law provides one of the broadest definitions of public records in the country."

Appellee Brief at 25-26 (emphasis supplied).

In California the open records statute also tracks exactly the language of the WVFOIA that "[p]ublic records," include, "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency." (Gov.Code, § 6252, subd. (e)). *Commission On Peace Officer Standards And Training v. Superior Court*, 42 Cal.4th 278, 288, 64 Cal.Rptr.3d 661, 667 (Cal.2007) explained that this same definition in the California law is:

"'intended to cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed. Only purely personal information unrelated to 'the conduct of the public's business' could be considered exempt from this definition.' (Assem. Statewide Information Policy Com., Final Rep. (Mar.1970) 1 Assem. J. (1970 Reg. Sess.) appen. p. 9.)"

5 CASES RELIED UPON BY APPELLEE ARE CONSISTENT WITH THE ASSOCIATED PRESS' ARGUMENTS

Any review beyond a cursory one shows conclusively that the cases cited by Appellee actually support Appellant's position of where the line is to be drawn in distinguishing between those records subject to disclosure and those that are exempt. In each of these cases, the AP's position is consistent with the courts' statements of where the line should be drawn as to the scope of "public records" under the WVFOIA. For example, in *Griffis, supra*, 156 P.3d at 422, n. 7, the court held that, " a grocery list written by a government employee while at work, a communication to schedule a family dinner, or a child's report card stored in a desk drawer in a government employee's office," would not be subject to disclosure. While such matters are not presented by this case, it is clear public records laws were not intended to encompass such purely private documents that are unrelated to the public's business, and that "the purpose of the law is to open *government* activity to public scrutiny, not to disclose information about private citizens." *Id.* (emphasis in original).

In *Denver Publishing Co. v. Bd. of County Commissioners*, 121 P.2d 190, 203 (Colo. 2005), a newspaper sent a FOIA requesting the e-mails between a county recorder and assistant chief deputy in view of the former chief deputy's sexual harassment lawsuit against the county recorder. The *Denver Publishing* court concluded, "[t]he only discernable purpose of disclosing the content of these messages is to shed light on the extent of Baker and Sales' fluency with sexually-explicit terminology and to satisfy the prurient interests of the press and the public," a

statement that is in accord with the position of the Appellant that records containing information that "relate to the conduct of the public's business" are "public records" under WVFOIA.[22] Records that do not relate to the public's business, and are simply sexually explicit would not meet that definition.

Tibierno, supra, 103 Wash. App. at 689-90, 13 P.3d at 1109-10, involved e-mails that contained, "intimate details about [a government employee's] personal and private life," and did not, "discuss specific instances of misconduct," that the Washington Court further concluded were, "of no public significance." The *Tibierno* court found that "[t]he public has no legitimate concern requiring release of the e-mails and they should be exempt from disclosure." Thus, *Griffis*, *Denver Publishing*, *Pulaski*, and *Tibierno* generally stand for the proposition that only e-mails wholly unrelated to the conduct of the public's business, that have no legitimate public concern, are exempt from disclosure because they do not meet the criteria for being a public record under those state's different statutes. The Circuit Court also adopted this view, agreeing that writings are not "public records" under WVFOIA unless they contain information "relating to the conduct of the public's business." Thus, at bottom, the ultimate findings of the courts in the cases cited by defendant, are not inconsistent with a holding in favor of disclosure in the case at bar.

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22 *But cf.*, n. 1, *supra* ("a main rule [is] that the identity and particular purpose of the requester is irrelevant under FOIA. This main rule serves as a check against selection among requesters, by agencies and reviewing courts, according to idiosyncratic estimations of the request's or requester's worthiness.") *U.S. Dept. of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 508, 114 S.Ct. 1006, 1019 (U.S.1994) (Ginsburg, J., concurring).

C THE THIRTEEN (13) E-MAILS DO NOT CONTAIN INFORMATION OF A PERSONAL NATURE NOR WOULD THEIR DISCLOSURE CONSTITUTE AN UNREASONABLE INVASION OF PRIVACY

Appellee also asserts the e-mails at issue are exempt from disclosure under exemption 2 of the WVFOIA. That provision exempts public records from disclosure under the following conditions:

> "*Information of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy* . . . unless the public interest by clear and convincing evidence requires disclosure in the particular instance[.]"

W.Va. Code § 29B-1-4(2). Appellee clearly recognizes the weakness of this argument, asserting it only in a footnote at the end of his brief. Appellee's Brief at 28, n. 80. A strong indication the e-mails at issue contain no information of a personal nature (such as that kept in a personal, medical or similar file) is that none of the e-mails the Circuit Court ordered disclosed contain such information exempted under *W.Va. Code* § 29B-1-4(2). It is curious that at the preliminary injunction hearing the Appellee actually admitted he had not read anything in any of the withheld e-mails that led him to believe that they fit the claimed exemption:

> "Q. Well, you recognize there are certain exemptions in the Freedom of Information Act that may prevent a public body from disclosing information through a FOIA request, correct?
>
> A. Yes.
>
> Q. And one of those I think you've alluded to is information of a personal nature but something like personnel records, medical records, correct?
>
> A. Yes.
>
> Q. Were any of the documents that you identified as being communication between Chief Justice Maynard and/or his staff and representatives of the Massey Corporation, were any of those medical records or personnel records?

A. No, I can't remember any that were that.

Prelim. Inj. Hearing Trans. at 29-30.

Furthermore, "when the Defendant originally denied the AP's FOIA request, he did not claim that the emails were exempt from disclosure under FOIA." September 16, 2008 Order at 14, n. 10. The Circuit Court found Appellee only, "raised the personal exemption after the AP filed for injunctive relief." *Id.* Appellee did not comply with the mandate of WVFOIA and this Court in failing to properly assert, identify and justify this claim of exemption. As the Circuit Court observed:

> "If the Defendant believed the documents contained personal information when he received the AP's request, he was required to produce a *Vaughn* index, providing 'a relatively detailed justification as to why each document is exempt, specifically identifying the reason(s) why an exemption under W.Va. Code , 29B-1-4 is relevant.' Syl. pt. 6, *Farley v. Worley*, 215 W.Va. 412, 599 S.E.2d 835 (2004). Additionally, the Defendant should have submitted 'an affidavit, indicating why disclosure of the documents would be harmful and why such documents should be exempt.' *Id.*

September 16, 2008 Order at 14. n. 10.

Particularly problematic is Appellee's failure to submit a sworn affidavit as directed by this Court in *Farley, supra.* In the absence of such an affidavit, Appellee's assertions regarding exemption 2 are simply unsworn representations of counsel. Appellee failed to adhere to the requirements of *Farley* and his claim of exemption should be rejected.

The Circuit Court nevertheless reviewed Appellee's belated assertion of exemption 2 on the merits, and found it wanting. The Circuit Court rejected the Appellee's assertion that the e-mails fall within the personal information exemption of the WVFOIA as follows:

> "Strictly construing the personal information exemption, the Court concludes that the five e-mail communications containing information relating to Justice Maynard's campaign for re-election do not contain the

> type of information sought to be protected by this exemption. These e-mails do not contain information such as that kept in a 'personal, medical or similar file.' Nor would disclosure of the information contained within these e-mails constitute an unreasonable invasion of privacy or result in injury or embarrassment. Furthermore, this is not the type of intimate information that is *required* to be submitted to a public body. Accordingly, the Court concludes that the five e-mail communications containing information relating to Justice Maynard's campaign for re-election are not exempt under the personal information exemption."

September 16, 2008 order at 14-15 (emphasis in original).

Only records "of a personal nature, the public disclosure thereof would constitute an unreasonable invasion of privacy" are entitled to the protection of exemption 2. The e-mail records at issue here are not medical or similar personnel records. They are, if Appellee has characterized them accurately in his circuit court brief, references to documents and articles to which no conceivable personal privacy interest could attach.[23]

The WVFOIA, as noted above, places the burden on the public body claiming an exemption to prove entitlement thereto. Here, Appellee fails to explain how these e-mails (with the content he has described) could fall within the scope of the records of a personal nature to which exemption 2 applies. Thus, he has failed to meet even the threshold test for consideration of entitlement to the exemption. It is unnecessary, therefore, for this Court to engage in the five point balancing test applicable to records that arguably fall within the scope of exemption 2.[24]

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[23] Appellee asserted to the circuit court that: "all of the subject e-mails in this case involve purely private matters and none make any references to any proceedings before the West Virginia Supreme Court of Appeals." Reply Brief of Appellee at 3, filed in the circuit court proceedings. In a footnote, Appellee further declared that, "all of the e-mails are private communications . . . concerning matters well outside the 'public record' and the 'public's business.'" *Id.*, at n. 5.

[24] This Court's five factor test requires:

> "In deciding whether the public disclosure of information of a personal nature under *W.Va. Code* § 29B-1-4(2) (1980) would constitute an

Even if this Court were to apply the balancing test, the withheld records would not be entitled to the protection of the exemption. "Under *W.Va. Code* 29B-1-4(2) [1977], a court must balance or weigh the individual's right of privacy against the public's right to know." *Syl.* pt. 7, *Hechler v. Casey,* 175 W.Va. 434, 333 S.E.2d 799 (1985).

As noted above, Appellee does not assert facts supported by an affidavit as required by *Farley* to show that disclosure of the emails would result in a *substantial* invasion of privacy. In fact, as noted above, his unsworn description of the content of the e-mails indicates disclosure will have no affect on privacy interests . Moreover, the significant extent of the public's right to know is not disputed by the Appellee, nor could it be. Citizens of West Virginia are entitled to know whether these records "prepared, owned and retained by a public body" show "whether or not Justice Maynard's relationship with the CEO of a litigant before the court "would have affected or influenced [his] decision-making in Massey cases." September 16, 2008 order at 13, n. 9. This factor thus favors disclosure.

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unreasonable invasion of privacy, this Court will look to five factors:

1. Whether disclosure would result in a substantial invasion of privacy and, if so, how serious.

2. The extent or value of the public interest, and the purpose or object of the individuals seeking disclosure.

3. Whether the information is available from other sources.

4. Whether the information was given with an expectation of confidentiality.

5. Whether it is possible to mould relief so as to limit the invasion of individual privacy."

Syllabus Point 2, *Child Protection Group v. Cline*, 177 W.Va. 29, 350 S.E.2d 541 (1986).

The Associated Press, of course, seeks to inform the public about the relationship between these two individuals as a result of litigation before this Court that has received so much public attention and scrutiny. This factor also favors disclosure.

The information is unavailable from any other source, another factor which also favors disclosure.

There is no evidence that Justice Maynard expected the e-mails to remain confidential. Such e-mails do not fall within any litigation privilege such as an attorney-client, or doctor and patient. The e-mails would not fall within the attorney work product doctrine.

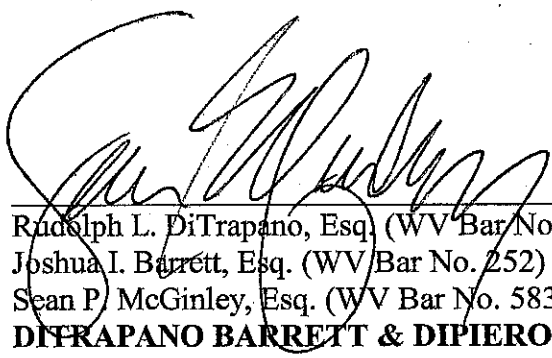
Finally, since there is nothing in the record to indicate the privacy interests of Justice Maynard are substantial, and it is clear that no privacy interest was impacted by the release of five (5) of the thirteen (13) e-mails, there is no reason to attempt to fashion or mould disclosure in order to limit an invasion of privacy.

It is beyond cavil as well, that West Virginia law also requires exemptions to the WVFOIA to be construed strictly and narrowly. *Syllabus* Point 4, *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985). Moreover, whenever a records custodian withholds documents, and is required to file a Vaughan Index, he must submit an affidavit, "indicating why disclosure of the documents would be harmful and why such documents should be exempt." *Syllabus* Point 6, *Farley v. Worley*, 215 W.Va. 412, 599 S.E.2d 835 (2004). Appellee failed to file an affidavit so showing, and thus has waived the right to assert the exemption.

CONCLUSION

For the reasons stated above, the Associated Press respectfully requests this Court reject the arguments of Appellee, and affirm the order of the Circuit Court of Kanawha County insofar as it ordered the disclosure of five emails between Justice Maynard and Mr. Blankenship, and reverse the Circuit Court and remand with instructions that the Circuit Court order disclosure of the remaining eight (8) emails between Justice Maynard and Mr. Blankenship. The AP respectfully requests this Court to order the release of these e-mails because they "relate to the conduct of the public's business," and are thus "public records" to which no express exemption from disclosure applies.

THE ASSOCIATED PRESS,
---------Appellant----------
By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

No. 34768

THE ASSOCIATED PRESS,

Appellant,

v.

STEVEN D. CANTERBURY,
Administrative Director of the
West Virginia Supreme Court of Appeals,

Appellee.

CERTIFICATE OF SERVICE

I, Sean P. McGinley, hereby certify on July 10, 2009 I served the foregoing **APPELLANT'S REPLY BRIEF** on counsel for Appellee by hand delivery on the following:

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EXHIBITS

ON

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